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No. 91-721

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

JAMES DAVIS, PETITIONER

v.

DONALD RICE, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly rejected petitioner's claim that he was disciplined more severely than white employees because of his race.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is unpublished, but the judgment is noted at 932 F.2d 975 (Table). The opinion of the district court (Pet. App. B1-B30) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1991. A petition for rehearing was denied on August 1, 1991. Pet. App. D1. The petition for a writ of certiorari was filed on October 30, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a black American, was a supervisory operating accountant employed by the Department of the Air Force. Following an investigation, the Inspector General determined that petitioner had engaged in sexual harassment of women employees over an eight-year period. Two of the women complained that they had been subjected to harassment in April 1989, the month in which the Inspector General began his inquiry. Pet. App. A3.

Respondent initially notified petitioner that he would be removed from his job on account of the harassment. Petitioner then submitted affidavits from other employees stating that they were not aware of any sexual harassment. The Chief of Accounting and Finance considered these affidavits and notified petitioner that he would be allowed to remain in federal service, but would be demoted from GS-12 to GS-11 and assigned nonsupervisory duties. Pet. App. A4.

At the same time, respondent also disciplined a similarly situated Caucasian employee, Donald Fairbetter, for sexually harassing two female subordinates. Fairbetter, like petitioner, had been a supervisory operating accountant. Fairbetter was also demoted to GS-11 and deprived of supervisory duties. Pet. App. A4-A5.

2. Petitioner appealed his demotion to the Merit Systems Protection Board (MSPB), alleging that he had been discriminated against because of his race. The Administrative Judge held that (1) petitioner had failed to establish a prima facie case of discrimination, (2) the agency had proved that petitioner sexually harassed three female employees, (3) there was no harmful error in the processing of the proposed removal and ultimate demotion action, and

(4) the demotion was "within the limits of reasonableness and promote[d] the efficiency of the service." Pet. App. A5-A6, B9. Petitioner did not pursue an administrative appeal to the MSPB. *Id.* at A6.

3. Petitioner then filed a complaint in the district court for the Western District of Oklahoma under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging racial discrimination and violation of due process and equal protection. The district court granted summary judgment for respondent. Pet. App. B1-B30. The court held that petitioner had failed to present a prima facie case of discrimination, and that the court lacked subject matter jurisdiction over his constitutional claims.

4. The court of appeals affirmed. Pet. App. A1-A17. The court concluded that petitioner had "failed to present sufficient evidence of discrimination" to make out a prima facie case. *Id.* at A9. The court rejected petitioner's contention that the entry of summary judgment deprived him of his right to trial de novo on his discrimination claim. *Id.* at A11-A14.[1]

ARGUMENT

Petitioner contends (Pet. 8, 12-13) that the sexual harassment charges were legally insufficient under *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986). Petitioner fails to explain the nature of this alleged insufficiency. In *Meritor*, the Court held that Title VII is violated when "discrimination based on sex has created a hostile or abusive work environment." *Id.* at 66. The court of appeals' decision in this case is fully consistent with *Meritor*. Petitioner engaged in

[1] In addition, the court of appeals affirmed the district court's determination that it lacked jurisdiction over petitioner's constitutional claims. Pet. App. A15-A17. Petitioner does not challenge that ruling.

repeated, unwelcome harassment of female employees. For example, he admits that he "complimented" a subordinate by saying that she was "looking like a white girl," Pet. App. B12, and told another subordinate "she was going to have to quit wearing that dress and showing off her legs," *id.* at B15-B16. In light of these admissions, and of the additional evidence of sexual harassment, see *id.* at B11-B21, including testimony under oath by a female subordinate "that Davis had commented on her rear over the past three years, had told her it was looking good, and compared it with those of other women," *id.* at B20, there is no basis for petitioner's assertion that the charges of sexual harassment were legally inadequate. See *Henson* v. *Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) ("Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.").

Petitioner also suggests (Pet. 8) that he should not have been disciplined for sexual harassment because the victims did not file sexual harassment charges within 30 days, as required by 29 C.F.R. 1613.214 (a)(i). Petitioner misinterprets Section 1613.214 (a)(i), which refers to the period within which an individual must file a complaint in order to preserve a Title VII claim against the agency.[2] Although the

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[2] The regulation states:

> An agency shall require that a complaint be submitted in writing by the complainant * * *. The agency may accept the complaint for processing in accordance with this subpart only if:
>
> (i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated

victims in this case could not have brought a claim against the agency because the 30-day period had expired, it does not follow that the agency is barred from disciplining petitioner for his misconduct.

Petitioner next contends (Pet. 13) that the courts below erred in holding that he failed to state a prima facie case of disparate treatment. But the court of appeals correctly noted that petitioner "can point to no one who was not a member of a protected group and whose circumstances were similar to his who received more favorable treatment than he did." Pet. App. A10. Indeed, the uncontradicted evidence shows that a similarly situated Caucasian supervisor received an identical demotion for his sexual harassment of women subordinates. See *id.* at A11, B18-B19. Thus, the courts below correctly concluded that petitioner failed to carry the initial burden of proving his Title VII claim.

Finally, petitioner contends (Pet. 9-10) that application of the "arbitrary and capricious" standard of review to his nondiscrimination claims deprived him of his right to a trial de novo on his discrimination claim. The governing statute provides that a reviewing court may overturn the MSPB's findings and conclusions only if they are arbitrary and capricious, obtained without procedures required by law, or unsupported by substantial evidence, "except that in the case of discrimination brought under [Title VII], the employee * * * shall have the right to have the facts subject to trial de novo by the reviewing court." 5 U.S.C. 7703(c).

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against within 30 calendar days of the date of the alleged discriminatory event.

29 C.F.R. 1613.214(a)(i).

Petitioner thus is correct that his discrimination claim was subject to trial de novo, while his procedural claims were subject to review under the arbitrary and capricious standard. But petitioner is incorrect in asserting that he received something less than a trial de novo of his discrimination claim. The court of appeals held (Pet. App. A14-A15) that the right to trial de novo did not preclude the entry of summary judgment, and petitioner does not challenge that holding. Nor was petitioner denied de novo review of his discrimination claim simply because the district court considered the administrative record of the sexual harassment claims. As the court of appeals explained (*id.* at A11-A13), the district court reviewed the administrative record to determine whether—assuming petitioner made out a prima facie case of discrimination—respondent had a legitimate, nondiscriminatory reason for demoting him. Because petitioner failed to establish a prima facie case of discrimination, the court had no occasion to consider respondent's reasons for demoting petitioner. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 254-255 (1981). Accordingly, petitioner's right to a de novo trial was not infringed.[3]

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[3] Petitioner also asserts (Pet. 13) that the MSPB's decision should have been set aside as arbitrary and capricious under 5 U.S.C. 7703(c)(1). Petitioner does not explain what aspects of the MSPB's decision constitute an abuse of discretion, and the record provides ample support for the Board's findings. See Pet. App. B11-B16.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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